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IN THE

Supreme Court of the United States

October Term 1942

No. 292

W. H. NEHER,

Petitioner,

vs.

A. E. HARWOOD, as Postmaster of the City of La Verne, California.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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No. .....

W. H. NEHER,

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A. E. HARWOOD, as Postmaster of the City of La Verne, California.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

To the Honorable the Supreme Court of the United States:

The petitioner, W. H. Neher, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit entered June 5, 1942 [R. 80] (..... Fed. (2d) .....) affirming a judgment of dismissal of the District Court for the Southern District of California [R. 63].

[R. 103]

Statement of the Matter Involved.

Petitioner brought suit in the District Court to enjoin respondent, the local postmaster at La Verne, California, from stamping petitioner's personal mail "Fraudulent" and returning it to the senders, and from otherwise carry-

ing out a postal fraud order of the Postmaster General [R. 23] purporting to have been issued under the so-called Postal Fraud Order Statute (U. S. C. A. Title 39, Sec. 259; R. S. 3929; 28 Stat. 946).

Petitioner sought injunctive relief upon the following grounds: that the order is void and issued in excess of statutory authority because it is unsupported by any evidence; that, in addition, it is affirmatively shown by the Findings of Fact of the Postmaster General that it is unsupported by the evidence [R. 7 and 31]; that the order was issued also beyond constitutional authority for the aforesaid reasons and also because of its provisions and the character of hearing at which it was made [R. 10 and 11]; that respondent cannot claim a void order of his superior, or anyone, as an excuse for violating petitioner's rights [R. 8].

Respondent moved to dismiss solely on the ground that "relief can only be granted against the Postmaster General who is not subject to the jurisdiction of the court" [R. 62]. The District Court granted this motion, and in addition, upon its own motion, and apparently through a misunderstanding, dismissed the action with prejudice upon the ground that no substantial question concerning the constitutionality of the statue is raised. There were no other grounds of dismissal [R. 4, 63, and Appendix A p. 8]. The Appellate Court affirmed [R. 103].

In neither of the lower courts did respondent contend that the complaint does not state facts sufficient to constitute a cause of action entitling petitioner to relief in some court [Appendix B p. 10]. As the record now stands petitioner not only cannot seek to enjoin the local

postmaster from committing asserted tortious acts against him but he cannot even seek to test the validity of the order of the Postmaster General in any district.

A summary statement of the allegations of the complaint [R. 7] and of the findings of fact of the Postmaster General [R. 37] are contained in the brief at page 17.

Petitioner relies not only upon the allegations of ultimate fact of his complaint, which must be assumed to be true for the purpose of testing the sufficiency of the complaint, but also upon the Findings of Fact of the Postmaster General, which are attached as Exhibit B to the complaint [R. 37], and which it was stipulated in an Agreed Statement Upon Appeal [R. 3], approved by the District Court [R. 6], constitutes the only exhibit of the complaint which is "necessary" or "material" to the Points Involved on the Appeal [R. 3 and 75, pars. II and III].

The opinion of the Appellate Court, by an obvious inadvertence, refers to missing exhibits and overlooks the aforesaid Agreed Statement and the fact that Exhibit B constitutes the Findings of Fact of the Postmaster General. It erroneously states: "Attached to the complaint is an exhibit (said Exhibit B) *which purports to be a record of all proceedings before the Post Office Department,* except Exhibits 12 to 15, and we are not informed as to these" [R. 100]. Due to this inadvertence the opinion condemns petitioner for, and quotes from, a highly prejudicial circular which was not related to the charges and which was not sent through the mail by petitioner, or anyone, with his authority [R. 100 and 29].

Jurisdiction of This Court and Statutes Involved.

(a) The jurisdiction of this court is invoked under Section 240a of the Judicial Code, as amended by the Act of February 13, 1925, c. 229; 43 Stat. 938; (28 U. S. C. A. Sec. 347).

(b) Petitioner does not attack the validity of the statute involved, the so-called "Fraud Order Statute" (39 U. S. C. A. Sec. 259), or of any statute, and all questions concerning the validity of the statute, if any existed, have been eliminated [R. 4, 5, 81 and 97, Appendix B p. 9]. (*Ex parte George Acret,* Dec. 15, 1941, 314 U. S. 585. Rehearing denied Jan. 12, 1942. 314 U. S. Adv. Sheets, No. 2, Appendix p. 18.) Proceedings may therefore be had independently of the provisions of 28 U. S. C. A. Sec. 380a. *William James & Co. v. Morganthau,* 307 U. S. 171; 83 L. Ed. 1189, 59 S. Ct. 804.

The material portion of the Postal Fraud Order Statute, with appropriate emphasis added, reads as follows:

> "The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any * * * scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any letters or mail matter arrive directed to any such person or company, * * * to return all such mail matter to the post office at which it was originally mailed with the word 'Fraudulent,' plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof. * * *"

R. S. 3929; Sept. 19, 1890, c. 908, Sec. 2, 26 Stat. 466; Mar. 2, 1895, c. 191, Sec. 4, 28 Stat. 946; 39 U. S. C. A. Sec. 259.)

Though the postal fraud order also purports to have been based upon Sec. 732 of said Title, the order is in fact not based upon that section [R. 36]. Sec. 732 relates to money orders and registered letters, none of which are involved here.

(c) The judgment of the Circuit Court of Appeals [R. 103] was made and entered June 5, 1942. The petition was filed in this court after July 5, 1942, and before September 4, 1942.

Questions Presented.

(1) Is the Postmaster General an indispensable party in a suit to enjoin a local postmaster in the district of his residence from stamping the word "Fraudulent" upon all mail addressed to petitioner, personal or otherwise, and returning it to the senders under color of an order alleged in the complaint to have been made beyond authority?

The following questions are merely incidental in appealing to the discretion of this court.

(2) Does the Postmaster General, upon proper charges and sufficient proof, merely have authority to stop the carrying out of a fraudulent scheme in which a person is then engaged, or is threatening to engage, or does he have the power to use the Postal Fraud Order Statute as a means of punishment for asserted past conduct, consisting of the supposed use of an asserted fraudulent

circular, which had no connection with the business with which petitioner was then engaged, and if ever used by petitioner at all, the findings of fact affirmatively establish, had been discontinued for a period of nearly three years? [R. 43.]

(3) Irrespective of the answer to the preceding questions does the complaint state facts sufficient to entitle petitioner to his day in court upon the merits in some district?

(4) Where the order complained of calls for the equivalent of a continuous branding by an agency of the United States Government of a person as a cheat and a fraud, thereby depriving him of one of his most precious liberties, to wit, his right to a good name, and where such branding is inescapable for life and so long as mail of any kind may be addressed to his name, or in the absolute discretion of such agency, was not petitioner in any event entitled to have had considered and decided by both the District Court and the Appellate Court the constitutional questions raised in the complaint, to wit: (a) whether any administrative agency can inflict a punishment such as has been inflicted here, and (b) whether an administrative agency in any event can take a portion—of a person's liberty—as distinguished from his property and inflict such a punishment, in the manner in which it was done here, to wit, at a hearing held 3000 miles from his place of residence, without the presumption of innocence, the right to a jury trial before an impartial judicial tribunal, and the protection of his other civil rights guaranteed by the Fourth, Fifth, Sixth and Eighth Amendments to the Constitution of the United States?

Rulings of the Courts Below.

The District Court dismissed the action with prejudice [Judgment, R. 63]. Its minute order and memorandum opinion appear at R. 3, which incorporates by reference its opinion in *Acret v. Harwood* (41 Fed. 492), [Appendix A], decided concurrently therewith. The judgment, the memorandum opinion, and the opinion in *Acret v. Harwood,* establish with regard to Question 1 herein that the court granted respondent's motion to dismiss solely on the grounds that the Postmaster General is an indispensable party, and that no substantial question concerning the constitutionality of the Postal Fraud Order Statute is stated [R. 63 and 4, and Appendix A p. 7].

It is merely incidental to an appeal to this court's discretion that in dismissing the action with prejudice the District Court confused the issues with those in *Acret v. Harwood* [R. 4], in which the question of the constitutionality of the statute was the only question involved [R. 97].

The Circuit Court of Appeals in its opinion filed June 5, 1942 (..... Fed. (2d) .....) [R. 80], expressly ruled with regard to Question Number 1 herein that the Postmaster General is an indispensable party [R. 97]. It also ruled that the complaint states no cause of action [R. 102].

The Appellate Court did not rule upon Questions Numbered 2 and 4 herein. These questions were raised by the allegations of the complaint (Brief p. 17) [R. 7 to 61], the Statement of Points on Appeal [R. 74] and they were assigned in Appellant's Opening Brief as reasons for the invalidity of the postal order under para-

graphs 1, 3, and 4, and therein under "Questions Involved" under paragraphs 1, 2, and 3 [Appendix B pp. 9 and 10].

Petitioner realizes that the opinion of the Appellate Court makes him appear unworthy of much consideration. He therefore feels impelled, before the opinion is read, to respectfully call attention to the fact that, for the purpose of testing the sufficiency of the complaint, it fails to assume as true his allegations of ultimate fact (Brief p. 99) and it condemns him and determines him guilty of fraud by begging the principal facts and by ignoring his principal questions of law, among which was, whether the highly prejudicial circular, quoted at length in the opinion [R. 100], was immaterial to the proceedings, and whether there was any finding or proof that this writing was ever used or sent through the mail by petitioner, or any person with his authority [R. 29 and 40].

It overlooks that there was an Agreed Statement on Appeal, approved by the trial court, and that Exhibit B is the Findings of Fact of the Postmaster General (and not the record of the proceedings as erroneously assumed by the court) and that its deficiencies are those of the Postmaster General and not those of this petitioner [Opin. R. 100].

The opinion completely disregards the fact that petitioner is seeking to avoid a continuous and degrading punishment, probably in excess of that imposed in any criminal

case, and that even the lowest criminal is entitled to his day in court.

It attempts to minimize the serious effect of the Postmaster General's perpetual order upon an expectation that he would relax this order upon a proper showing [R. 102], while it would seem that in no free country should a citizen be condemned to punishment, perpetually, for life, or at all, by an administrative official, nor should he be dependent upon the largess of such an official for restoration of any part of his liberties.

Reasons for Allowance of the Writ.

Reason I.

The Circuit Court of Appeals held in the case at bar that the Postmaster General is an indispensable party [R. 97].

The opinion is in conflict with *Rood v. Goodman* (Fifth Circuit, 1936), 83 F. (2d) 28, 31, which like the case at bar was an action to enjoin the defendant local postmaster from withholding the plaintiff's mail under color of an identical postal fraud order alleged to have been made beyond authority. In that case, as well as in other cases cited and quoted in the brief, the court held that the Postmaster General is not an indispensable party and stated as follows:

> "* * * until a valid fraud order is issued against him, a citizen of the United States has, under the laws as they now stand, not a mere privilege, but

a right, to the use of the mails, and in the course of regular deliveries, to receive mail sent to him. When, then, a postmaster unlawfully withholds delivery, the owner of the mail has a right to proceed against the postmaster to prevent that wrongful interference with his property and his rights. This is not a case in which the plaintiff is attempting to compel a subordinate official to exercise a discretion which only his superior can exercise. It is a case in which an official is acting affirmatively against a plaintiff, by seizing his mail, and preventing its delivery. It is that affirmative action which the suit seeks to enjoin [as here]. Colorado v. Toll, 268 U. S. 228, 45 S. Ct. 505, 69 L. Ed. 927; Yarnell v. Hillsborough Packing Co. (C. C. A.), 70 F. (2d) 435; Ryan v. Amazon Pet. Corp. (C. C. A.), 71 F. (2d) 1."

The opinion in the instant case recognizes the aforesaid and other conflicts and cites *Rood v. Goodman, supra,* and states:

"In view of the fact that there is confusion in courts as to the necessity of joining superior officers *when acts of subordinates are sought to be enjoined* we have made a fairly thorough examination of the decisions and opinions upon the subject in an attempt to discover a principle which will *largely* reconcile them.

* * * * * * * *

"In 1936 the Honorable Learned Hand, United States Circuit Judge for the Second Circuit, wrote the opinion of that Court in the case of National

Conference on Legalizing Lotteries, Inc. v. Goldman, 85 Fed. (2d) 66, in which he analyzed the cases on the subject. Yarnell v. Hillsborough Packing Co., Ryan v. Amazon Petroleum Corporation and *Rood v. Goodman* are all interpreted as holding that Colorado v. Toll [268 U. S. 228] overruled Gnerich v. Rutter and Webster v. Fall [which latter cases held the superior indispensable]."

REASON II.

Whether the Postmaster General is an indispensable party involves an important question of federal law which has not been, but should be settled by this court. It is important because of its frequent occurrence. The number of the order involved here indicates that it is close to being the sixteen-thousandths which has been made [R. 23], in all of which consideration of the possibility of a contest necessarily involved the question of where suit may be commenced and against whom [R. 23]. The question also arises with relation to the orders of other agencies.

The question is important for the compelling reason that if a citizen on the Pacific Coast must commence a suit in the District of Columbia to prevent a local official from violating his rights under claim of immunity of a void order, or under any other excuse, then liberty in America is in serious jeopardy. In such circumstances an administrative agency could violate a citizen's rights in any manner it might choose and in probably ninety-nine cases out of a hundred the citizen would be power-

less to protect his rights and wholly without any practicable means of relief. The civil liberty provisions of the Constitution would then be mere high sounding phrases as to those most in need of their protection.

It would seem that this is one of the most important civil liberty questions now pending in the United States.

This case is a proper vehicle for consideration of this important question by this court especially for the reason that it appears that petitioner is the first and only litigant who has seen fit to present it in this aspect, though it has been before courts for more than fifty years.

The fact that counsel are personally bearing the expense of these proceedings as a contribution to that which they believe vitally affects the national welfare may furnish additional ground for an appeal to this court's discretion.

Reason III.

If it may be said that the aforesaid Question Number 1 has been settled by this court in *Colorado v. Toll,* 268 U. S. 228, 45 S. Ct. 505, 69 L. Ed. 927, and in *American School of Magnetic Healing v. McAnnulty,* 187 U. S. 94, 47 L. Ed. 90, 23 S. Ct. 33, then the decisions of the lower courts herein are in conflict with such decisions.

Reason IV.

Questions Numbered 2 and 4 involve questions of federal law which have not been, but should be settled by this court. They have some importance because they involve fundamental questions of administrative law which are necessarily of frequent occurrence.

REASON V.

By denying petitioner a hearing on the merits in some court, the lower courts so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision (Questions Numbered 3 and 4).

For these reasons it is respectfully prayed that the petition be granted.

W. H. NEHER,
Petitioner.

We hereby certify that the within petition is well founded and not interposed for delay.

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Attorneys for Petitioner.

State of California, County of Los Angeles—ss.

W. H. Neher, being by me first duly sworn, deposes and says: that he is the petitioner in the within proceeding in the above entitled action; that he has read the foregoing petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

W. H. NEHER.

Subscribed and sworn to before me this 5th day of August, 1942.

(Seal) LESLIE SKEEN,

Notary Public in and for the County of Los Angeles, State of California.